Supreme Court, U.S.
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No. 94-2083

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1995

TIMOTHY L. STERN,
Petitioner,

v.

DONNA E. SHALALA, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, and her delegate, JUNE GIBBS BROWN, INSPECTOR GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO GOVERNMENT'S BRIEF

The Government, in its Brief in Opposition to the Petition for Certiorari, argues that even though Petitioner succeeded, on his appeal to the Second Circuit, in vacating approximately 85% of the penalties and assessments which had been sought by the Inspector General, he is nevertheless not entitled to EAJA fees.

I

THE GOVERNMENT'S ARGUMENT THAT IT DID NOT HAVE TO BE SUBSTANTIALLY JUSTIFIED IN ITS POSITION TAKEN ON APPEAL IS WRONG

The Government bases a substantial portion of its argument on INS v. Jean, 496 U.S. 154 (1990), which, it argues, stands for the proposition that the Government's position "as a whole" must be evaluated. Citing that case as its precedent, the Government argues that its

position was substantially justified as a whole, without regard to whether the Government was substantially justified in making the argument upon which it lost in the Second Circuit (Government's Brief, pages 7, 8).

The Second Circuit agreed with an argument Dr. Stern had made from the inception of the administrative proceedings, namely that all penalties levied against Dr. Stern by the Inspector General were precluded by a Plea Agreement between him and the Government which had been entered in a prior criminal proceeding. As a result of its decision, the Second Circuit vacated $345,000 of penalties which had been assessed by the ALJ and upheld by the Appeals Board of HHS.[1]

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[1] The Inspector General initiated proceedings against Dr. Stern by levying penalties of $425,250, assessments of $70,428 and a thirty-year exclusion from Medicare. In the administrative hearing, Dr. Stern succeeded in securing a reduction of the penalties to $345,000 and a reduction of

(continued...)

The Government, in its Brief in Opposition, argues that whether or not its position with respect to the Plea Agreement was substantially justified is irrelevant. According to the Government, all that matters is that it was justified in initiating a CMPL proceeding, because the Government's position that Dr. Stern had submitted improper claims to Medicare was sustained in the administrative determination, and that determination was not disturbed by the Second Circuit. Accordingly, argues the Government, its position "as a whole" was substantially justified within the meaning of INS v. Jean, supra.

The fact of the matter is that Dr. Stern did not try to reargue to the Second Circuit the question of whether he had submitted improper claims to Medicare; and the

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[1](...continued)
the exclusion from Medicare from thirty years to ten years. The Second Circuit vacated the remainder of the penalties.

Second Circuit did not base its decision, vacating the penalties levied against Dr. Stern, on whether Dr. Stern had submitted improper claims.

Dr. Stern did argue in the Court of Appeals, as he had for four years in the administrative proceedings, that the imposition of penalties was precluded by his Plea Agreement with the Government in earlier criminal proceedings.[2] Although the Government makes a feeble attempt in its Brief in Opposition herein to also

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[2] The Petitioner also made numerous other legal arguments to the Second Circuit. However, the Second Circuit only had to reach one of those arguments in vacating the penalties, and consequently did not find for or against the Petitioner on his other arguments. The Second Circuit did, however, gratuitously indicate that Petitioner presented a "substantial argument" on another of his positions, namely that the Government was also precluded from imposing penalties as the result of the collateral estoppel effect of a prior administrative hearing, in which it was found that there was a "legitimate difference of opinion" as to whether Dr. Stern's services were properly reimbursable. Petition for Certiorari, Appendix B, page 1013.

argue that the Government was reasonably justified in construing the Plea Agreement to permit the imposition of penalties by the Government, that argument simply lacks any conceivable substance or reality, and was denounced by the Second Circuit.[3]

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[3] The Government attempted, in its Brief to this Court, to reargue that the "written" Plea Agreement could have been reasonably construed by the Government to permit the Government to impose the full range of CMPL penalties and assessments against Dr. Stern. This argument is simply a rehash of what was rejected by the Second Circuit in its opinion vacating the penalties. The Government's argument to that effect was also treated with disdain by the Second Circuit in the oral argument before it (reprinted in the Petition for Certiorari, Appendix D).

The Second Circuit found that the written Plea Agreement was given very specific and unambiguous meaning in the allocution in district court at the time the Plea Agreement was proffered, and specifically in the statements of the Assistant United States Attorney.

More specifically, the Second Circuit referred to the statement of the Assistant United States Attorney in which he referred to "disputed claims" submitted under

(continued...)

Stated succinctly, the Government's position is that if it were substantially justified in initiating an administrative proceeding at all (in this case, a CMPL proceeding), INS v. Jean, supra stands for the proposition that

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[3](...continued)
Medicare by Dr. Stern, which the Government reserved the right to recover. The Court found, accordingly, that the Government reserved its right only to seek recovery of its "actual losses." (Petition for Certiorari, Appendix B, pages 1013 - 1015).

Even more specifically, the Second Circuit pointedly referred to a letter written by the Assistant United States Attorney to the Inspector General of HHS, no less than two weeks after the Plea Agreement had been entered into, which "fully confirms Stern's understanding that only the claim for actual losses remained open." (Petition for Certiorari, Appendix B, page 1014).

The Second Circuit also indicated, unambiguously, its opinion that the Assistant United States Attorney deliberately sought to subvert that understanding by deciding that the pursuit of penalties in a CMPL proceeding would be "much easier." (Petition for Certiorari, Appendix B, page 1014).

the Government could seek any recovery it desired, however unjustified, without risking the imposition of EAJA fees.

INS v. Jean, supra, in fact, would appear to be rather inapposite to the circumstances of this case. In that case, the district court had found the private litigant to be the prevailing party, and the position of the Government not to be substantially justified. The issue before this Court was whether, in awarding fees to the litigant, the award should also encompass services in an ancillary proceeding held to determine the amount of EAJA fees. In finding in the affirmative, and against the Government's argument that a separate determination should be made as to whether the Government's position in the ancillary proceeding was substantially justified, the Court stated: "The EAJA -- like other fee-

shifting statutes -- favors treating a case as an inclusive whole, rather than as atomized line-items." 496 U.S. 154, at 161-162.

This Court, in INS v. Jean, supra, also stated that "In EAJA cases, the court first must determine if the applicant is a 'prevailing party' by evaluating the degree of success obtained." 496 U.S. 154, at 160. The Government herein does not appear to dispute that Petitioner was the prevailing party, under the standard established in Texas State Teachers Association v. Garland Independent School Dist., 489 U.S. 782 (1989), in that he "succeeded on [a] significant claim affording [him] some of the relief sought." Id., at 1494. However, at the same time that the Government does not dispute Petitioner's status as a prevailing party, it attempts to argue that the issue of "substantial justification" should not be deter-

mined with reference to the same significant claim on which Petitioner prevailed. Instead, the Government asserts that INS v. Jean, supra, as applied to this case, would mandate the determination of "substantial justification" with respect to an issue not even argued on appeal, namely whether Dr. Stern submitted proper claims to Medicare. Such an interpretation by the Government (and apparently the Second Circuit) of INS v. Jean, supra, as a basis upon which to deny EAJA fees to the Petitioner in the case at bar, certainly suggests the need for clarification by this Court as to the reach and meaning of that decision and of the EAJA.

II

THE GOVERNMENT'S POSITION THAT IT WAS SUBSTANTIALLY JUSTIFIED IN INTENTIONALLY IGNORING THE PLEA AGREEMENT, BECAUSE OF ITS DUTY TO PURSUE CMPL RECOVERY, HAS NO BASIS IN FACT OR LAW

The Government also argues, in its Brief in Opposition, that its position was "substantially justified," and that EAJA fees are therefore not recoverable, on an imaginative, though frightening, theory which renders irrelevant the finding of the Court of Appeals that the Government intentionally disregarded its Plea Agreement with Dr. Stern.

As detailed in footnote 3 above, the Second Circuit unambiguously found that the Government intentionally ignored, and in fact attempted to subvert, what both it and Dr. Stern clearly understood to be the terms of the Plea Agreement.

In support of a seemingly impossible argument that such deliberate disregard of the Plea Agreement is in fact irrelevant to the determination of whether its position was substantially justified, the Government emphasizes the finding of the Appeals Board of HHS (effectively rendered irrelevant by the opinion of the Second Circuit) that "there was a reasonable, indeed direct, relationship between the amount of the assessment [$70,000] and penalties [$345,000] imposed and the damages incurred by the government" (Government's Brief, page 5). The Government then proceeds to argue that "HHS was under a statutory mandate to attempt to recoup the losses to Medicare and to the government caused by...[Dr. Stern's] misconduct," apparently notwithstanding any constraints of the Plea Agreement. (Government's Brief, page 8).

The Government never argued such a theory to the Second Circuit. In fact, to do so would have been absurd, since it has never been suggested or argued that the CMPL requires the Government to seek any minimum amount of penalties or assessments, and to therefore fail to honor its contractual obligations. To now assert the "substantial justification" of such a "force majeure" theory, as a defense to EAJA fees, is arrogant, and destructive of the entire purpose of the EAJA.

CONCLUSION

The EAJA is a statutory provision the purpose of which is to guarantee access to the justice system for those who are subjected to unreasonable Governmental action. It would emasculate the intent of this Act to hold that the Government has full license to seek what-

ever unwarranted recovery it wants, free of the reach of the EAJA, so long as the underlying conduct of a citizen was unjustified. It would also emasculate the intent of this Act to suggest that the Government is free to disregard its contractual obligations with impunity, in the name of exercising its discretionary powers in implementing a statutory provision.

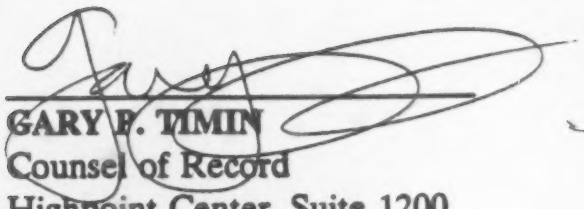
In all appropriate senses of the word, Dr. Stern prevailed in this litigation, after having been put through the ringer by the Government for four years, during the entirety of which he argued that the unambiguous meaning of his Plea Agreement precluded the Government from doing what it was doing. The decision of the Second Circuit, as well as the stream of comments from the Bench during oral argument, leave little to the imagination in terms of the lack of reasonable justification which

the Court considered the Government's position to have, regarding the Plea Agreement.

As detailed in the Petition for Certiorari, the Government's actions have been very costly to Petitioner; and he is currently saddled with very substantial unpaid legal bills, for which judgment has been taken against him.

The Government contends that its interpretation of what is "substantially justified" has clear support in the prior holdings of this Court. The Government also contends that the appropriate interpretation of INS v. Jean, supra, pertaining to the substantial justification of the Government's position "as a whole" in this proceeding, needs no further clarification. Petitioner submits that the need for clarification is obvious, in the face of the Government's (and evidently, the Second Circuit's) interpretation of the Supreme Court's prior precedent,

Respectfully submitted,



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